

HISTORICAL DIVISION[223]

Adopted and Filed

Pursuant to the authority of Iowa Code section 303.1A, the Director of the Department of Cultural Affairs hereby amends Chapter 42, “Review and Compliance Program,” Iowa Administrative Code.

The amendments to Chapter 42 clarify the procedures the State Historic Preservation Office will follow to implement the Review and Compliance Program requirements in Section 106 of the National Historic Preservation Act and Iowa Code chapter 303, describe the level of effort required to identify historic properties, and establish a review and appeal procedure for the recommendations and decisions of the State Historic Preservation Officer.

Notice of Intended Action for these amendments was published in the April 18, 2012, Iowa Administrative Bulletin as **ARC 0103C**.

One public hearing was held on May 10, 2012, to receive comments on the Notice of Intended Action. In addition, representatives of the Department appeared before the Administrative Rules Review Committee (ARRC) on May 8, 2012. Written comments were received by the Department until May 10, 2012.

The Director received comments from the Advisory Council on Historic Preservation (ACHP) and the National Park Service (NPS), the principal federal agencies responsible for implementing and ensuring compliance with the National Historic Preservation Act; the federal agency Rural Utilities Service (RUS), a primary lender to Iowa’s rural utilities; the National Trust for Historic Preservation (NTHP), a national, privately funded preservation organization; the state organization Preservation Iowa; the Iowa Tribe of Kansas and Nebraska; the Association of Iowa Archaeologists; and a number of archaeologists and interested persons.

Based upon the comments received, the Director has modified the amendments published under Notice of Intended Action.

The definition of “adequate documentation” was proposed to be added to this chapter but was not adopted because, as stated by the commenters, the term does not appear in the chapter and because the standards for documentation are established by federal regulations, primarily 36 CFR §800.1.

In addition, the definitions of the terms “agreements” and “historic property” were modified to conform to federal agency comments, and a definition of “recommendations and decisions” was added.

Paragraph 42.5(2)“a” has been modified in response to comments by replacing the phrase “formal SHPO comment” with “the views of the SHPO” to distinguish the formal commenting authority that rests with the ACHP from the capacity to comment that the SHPO is afforded in the review process.

In response to comments, paragraph 42.5(2)“c” was not adopted because it duplicated rule 223—42.3(303), and subsequent paragraphs have been relettered.

Paragraph 42.5(2)“d” (now paragraph 42.5(2)“c”) has been modified in response to comments to clarify that the intent of the paragraph is to require the SHPO to respond to initial determinations submitted by applicants and groups of applicants authorized by the federal agency pursuant to 36 CFR §800.2(c)(4) to initiate the consultations process.

Paragraph 42.5(2)“e” (now paragraph 42.5(2)“d”) has been modified in response to comments to clarify that, in the process of listing a property on the National Register of Historic Places, the federal agency and not the SHPO is authorized to make final determinations as to National Register eligibility. The SHPO is one of a number of entities that are authorized to render an opinion on eligibility.

Paragraph 42.5(2)“f” (now paragraph 42.5(2)“e”) has been modified in response to comments to clarify that the intent of the paragraph is to require the SHPO, if the SHPO disagrees with a federal agency determination of eligibility, to explain why the SHPO disagrees and to base the SHPO’s opinion on federal criteria for listing.

Paragraph 42.5(2)“g” (now paragraph 42.5(2)“f”) has been modified in response to comments to clarify that the SHPO may comment or may elect not to comment on agency determinations and findings of effect.

Paragraph 42.5(2)“h” (now paragraph 42.5(2)“g”) has been modified in response to comments to refer to the Council as the Advisory Council and to replace the parenthetical reference to the CFR with the phrase “in accordance with 36 CFR §800.5(a).”

Paragraph 42.5(2)“i” (now paragraph 42.5(2)“h”) has been modified in response to comments by adding the following sentence: “The SHPO shall base any recommendations upon consideration of all of the factors enumerated in 36 CFR §800.4(b)(1).”

Paragraph 42.5(2)“k” (now paragraph 42.5(2)“j”) has been modified in response to comments to remove the 14-day limit on the extension of a comment period. Commenters expressed concerns that the 14-day extension may not be long enough if the situation to be reviewed is complicated. The paragraph has also been modified to replace the phrase “if the applicant agrees” with “upon advising the applicant.”

The National Park Service raised a concern regarding the lack of a provision allowing for waiver of these rules. Iowa Code section 17A.9A authorizes a state agency to waive its rules when it has adopted a process for evaluating waiver requests and establishing grounds for granting waivers. The Department has not adopted rules establishing such a process, however, and therefore cannot, by law, waive its rules. In the alternative, the following new subrule is adopted to address some aspect of the National Park Service’s concern:

“42.5(4) *Emergency procedures.* The SHPO shall abide by the procedures that govern an agency’s historic preservation responsibilities during any disaster or emergency in lieu of 36 CFR §§800.3 through 800.6.”

Subrule 42.6(1) has been modified in response to comments to incorporate guidance from the ACHP as additional factors to consider in determining the level of effort expected to identify historic properties.

Subrule 42.6(2) has been modified in response to comments to provide a clearer connection between recommendations for the identification of historic properties and the “reasonable and good faith” standard and all of the factors of that standard set forth in federal regulation 36 CFR §800.4(b)(1).

The NTHP commented that subrule 42.6(4), which establishes the level of effort to identify historic properties required of rural electric cooperatives, is not consistent with Iowa Code section 303.18 and that it is the federal agency’s and the SHPO’s responsibility to determine the level of effort. This subrule has been amended to clarify that Iowa Code section 303.18 pertains to “municipal utilities” and not “municipalities.” No other action was taken to modify the subrule because the federal agencies responsible for ensuring the compliance with the Act generally and the level of effort required to identify historic properties in particular had no objections to the subrule as written.

Subrule 42.7(1) has been modified in response to comments to clarify that the appeal process afforded by rule 223—42.7(303) is in addition to the federal appeal process afforded by 36 CFR Part 800.

Subrule 42.7(2) has been modified in response to comments to adopt, for purposes of the rule, the definition of “person” found in Iowa Code section 4.1(20).

Subrule 42.7(4) has been modified in response to comments to clarify that a decision of the director is a final action for State of Iowa appeal purposes and is not a final federal agency action.

In addition, the NPS, NTHP and a number of individuals commented that the rules do not include an effective date or “grandfather” provision or allow for waivers in the event of extraordinary or emergency situations.

With respect to the effective date, one of the purposes of these amendments is to implement the provisions of 2011 Iowa Acts, House File 267, codified as 2011 Iowa Code Supplement section 303.2(2)“c.” Pursuant to section 3 of House File 267, the effective date of the Act was the day it was signed, March 29, 2011. 2011 Iowa Code Supplement section 303.2(2)“c” itself, however, has no “grandfather” or transitioning period. Given that the Legislature elected to authorize the Director to review the decisions of the SHPO, without limitation, the Director is not empowered to constrain that authority by rule.

A copy of the comments and the Director’s response may be requested by contacting Kristen Vander Molen, Department of Cultural Affairs, Historical Building, 600 East Locust Street, Des Moines, Iowa 50319-0290; fax (515)282-0502 or e-mail Kristen.VanderMolen@iowa.gov.

After analysis and review of this rule making, a positive impact on jobs exists. This rule making implements recent legislation by describing the purpose and the implementation of the state’s historic

preservation Review and Compliance Program, defines the level of effort required by Iowa's electric cooperatives and municipal utilities to identify historic properties, and sets forth the process for the Director's review of the actions of the SHPO.

The rules have a direct impact on projects, activities, or programs funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including those carried out with federal financial assistance. For example, two federal agencies, the Rural Utilities Service (RUS) and the Federal Emergency Management Agency (FEMA) finance, through grants and loans, construction projects undertaken by Iowa's electric cooperatives and municipal utilities. FEMA and RUS, as a condition of this financing, require these utilities to assist the agencies in taking into account the effect these projects may have on historic properties. The number of projects impacted by these rules is significant.

FEMA and the State of Iowa have approved 2,400 miles of line construction directly tied to the FEMA 404 Mitigation Program. Currently pending, there are another 1,300 miles of construction projects being evaluated and considered for approval by FEMA. The total cost of these projects is \$225 million. For each 100 miles of line constructed, which would take approximately 52 weeks to complete, approximately 18 to 20 construction personnel who will be utilizing three digger derrick trucks, three backset trucks, and four pick-up trucks are required. These rules, therefore, impact the work of as many as 740 job holders for a 52-week period for these approved and proposed FEMA hazard mitigation projects. In addition, the crews stay in local Iowa hotels and eat three meals a day at local Iowa restaurants. The majority of these projects take place in rural Iowa and greatly benefit small towns in Iowa. Also, each truck will use approximately 60 to 80 gallons of fuel per week. All fuel purchases will be made in Iowa. The total fuel purchases for 10 trucks for 52-week projects will be approximately 36,400 gallons per project.

Also, contractors rent space to park the ten vehicles used per project, storage for materials, and office space for contractors. Contractors utilize local Iowa mechanic shops for repairs on trucks. Further, the bulk of the construction materials are provided by distributors located in the state of Iowa. Multiple jobs will be created due to the sheer volume of materials required for each construction project. The transportation industry in Iowa will benefit because of the materials being shipped to Iowa. The state will receive a positive fiscal impact due to the significant amount of sales tax purchased on materials bought in Iowa.

In addition to these FEMA mitigation projects, these rules will also positively impact the expeditious completion of future storm recovery projects financed by FEMA and RUS and the hundreds of miles of critical infrastructure that are undertaken each year as part of planned facility replacement and upgrades.

These amendments are intended to implement 2011 Iowa Code Supplement section 303.2, subsection 2, paragraph "c," and section 303.18.

These amendments shall become effective September 12, 2012.

The following amendments are adopted.

ITEM 1. Amend rule 223—42.1(303) as follows:

223—42.1(303) Purpose. ~~The review and compliance program implements Section 106 of the National Historic Preservation Act of 1966 for the purpose of taking into account the effects of an agency's undertaking on properties included in or eligible for the National Register of Historic Places~~ state historic preservation program activities to advise and assist public (federal, state, and local government) agencies in carrying out their historic preservation responsibilities broadly described and established under the National Historic Preservation Act, particularly Sections 106 and 110, as well as other state and federal historic preservation laws and regulations.

ITEM 2. Amend rule 223—42.2(303) as follows:

223—42.2(303) Regulations Federal regulations and requirements. ~~The Iowa review and compliance program shall operate in accordance with the National Historic Preservation Act of 1966, Section 106; and 36 CFR Part 800, September 21, 1986. following requirements:~~

42.2(1) The National Historic Preservation Act (16 U.S.C. 470 et seq.).

42.2(2) Title 36 of the Code of Federal Regulations Part 60 (36 CFR 60).

42.2(3) Title 36 of the Code of Federal Regulations Part 61 (36 CFR 61).

42.2(4) Title 36 of the Code of Federal Regulations Part 63 (36 CFR 63).

42.2(5) Title 36 of the Code of Federal Regulations Part 800 (36 CFR 800).

42.2(6) Contract requirements outlined in the state of Iowa's Historic Preservation Fund grant agreement with the National Park Service, including requirements described in the Historic Preservation Fund Grants Manual, special conditions attached to the grant agreement, and any other National Park Service requirement considered a condition of receiving the annual federal grant.

42.2(7) Nationwide Programmatic Agreements and other federal program alternatives executed or issued by the Advisory Council on Historic Preservation under 36 CFR §800.14, as applicable.

42.2(8) State-level programmatic agreements and memoranda of agreements executed under 36 CFR §§800.6 and 800.14.

42.2(9) Easements and covenants granted pursuant to the implementation of state historic preservation program activities.

42.2(10) Iowa Code chapter 303.

ITEM 3. Renumber rule **223—42.3(303)** as **223—42.5(303)**.

ITEM 4. Adopt the following **new** rules 223—42.3(303) and 223—42.4(303):

223—42.3(303) Professional qualifications. In keeping with federal Historic Preservation Fund grant requirements, the department shall employ a professionally qualified staff that meets the requirements set forth in 36 CFR §61.4(e).

223—42.4(303) Definitions. Unless the context requires otherwise, the definitions provided in the National Historic Preservation Act and its implementing regulations at 36 CFR Part 60, 36 CFR Part 61, and 36 CFR Part 800 shall apply to terms as they are used through this chapter. In addition, the following definitions apply:

“*Act*” means the National Historic Preservation Act (16 U.S.C. §470 et seq.).

“*Agency*” means federal agency.

“*Agreement*” means any agreement executed in accordance with the regulations implementing Section 106 at 36 CFR Part 800 and any agreement authorized by Iowa Code section 28E.4.

“*Area of potential effects*” or “*APE*” means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking (36 CFR §800.16(d)).

“*Historic property*” means “historic property” as defined in Section 301(5) of the National Historic Preservation Act as amended through December 22, 2006 (16 U.S.C. §470w(5)).

“*Recommendations and decisions*” means the actions taken by the SHPO to advise and assist federal agencies in carrying out their Section 106 responsibilities.

“*Undertaking*” means, as defined in Section 301 of the National Historic Preservation Act, a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including (1) those carried out by or on behalf of the federal agency; (2) those carried out with federal financial assistance; (3) those requiring a federal permit, license or approval; and (4) those subject to state or local regulation administered pursuant to a delegation or approval by a federal agency.

ITEM 5. Amend renumbered rule 223—42.5(303) as follows:

223—42.5(303) Procedures.

42.5(1) *Technical assistance.* ~~The state historic preservation officer, or designee, shall consult with agency officials expending federal funds to identify historic properties, assess effects of the undertaking on historic properties, and consider alternatives to avoid or reduce the effects. The state historic preservation office (SHPO) shall advise and assist federal agencies in carrying out their responsibilities~~

under the Act (and other federal historic preservation laws) and shall cooperate with federal agencies, state agencies, local governments, or their applicants; organizations; and individuals to ensure historic properties are taken into consideration at all levels of planning and development.

42.5(2) SHPO review of federal undertakings.

a. In accordance with applicable federal and state laws and regulations, agency officials and agency program applicants or recipients requesting the views of the SHPO on an undertaking shall submit documentation regarding the undertaking and potential effects to historic properties.

b. Agency officials desiring a Section 106 review shall contact the review and compliance coordinator to obtain the appropriate forms required to evaluate the effects. Completion of the forms does not constitute clearance of the proposed projects, but is intended to assist the review and compliance staff in rendering an informed recommendation. The SHPO shall make available forms intended to assist agency officials and agency program applicants and recipients in organizing information and to allow the review and compliance program staff and other consulting parties to render informed advice on an undertaking. Forms will be made available on the state historical society of Iowa Web site. ~~Inquiries may~~ Submittals shall be directed to Review and Compliance Coordinator, State Historical Society of Iowa, Capitol Complex, Des Moines, Iowa 50319, (515)281-4137.

c. The SHPO shall respond to initial determinations submitted by an applicant or groups of applicants authorized to initiate consultation by the agency pursuant to 36 CFR §800.2(c)(4) or to a final agency determination of eligibility.

d. The SHPO shall apply the National Register Criteria for Evaluation when opining on determinations of National Register eligibility.

e. With respect to the determination of whether a property is eligible for listing, in the event that the SHPO and the agency official do not agree as to the determination of eligibility, the SHPO shall include an explanation of its opinion which shall be based on the National Register criteria and relevant National Park Service guidelines for evaluation of historic properties.

f. The SHPO may respond to agency determinations and findings of effect.

g. A SHPO nonconcurrence with an agency finding of effect shall include an explanation based upon the Advisory Council's criteria of adverse effect in accordance with 36 CFR §800.5(a).

h. If the SHPO elects to consult, the SHPO shall respond within 30 calendar days of receipt of an agency's request for review of a finding or determination in accordance with 36 CFR §800.3(c)(4) and the National Park Service's applicable requirements. The SHPO shall base any recommendations upon consideration of all of the factors enumerated in 36 CFR §800.4(b)(1).

i. The recommendations and decisions of the SHPO are subject to the review and approval of the director. This review may be initiated by the director for any reason or may be requested in the manner described in rule 223—42.7(303). To facilitate this opportunity for review, the SHPO will generally submit its recommendation to the director within 14 calendar days of receipt.

j. If the director is unable to make a determination regarding the request for review within the federally mandated 30-day consultation period, the director may, upon advising the applicant, request that the federal agency extend the consultation period for such time as the director requires to make such a determination.

42.5(3) Resolution of adverse effects. The SHPO shall participate in the consultation to develop and evaluate alternatives or modifications to undertakings that could avoid, minimize, or mitigate adverse effects on historic properties in accordance with the provisions of 36 CFR §800.6 or the terms of executed agreements, easements and covenants.

42.5(4) Emergency procedures. The SHPO shall abide by the procedures that govern an agency's historic preservation responsibilities during any disaster or emergency in lieu of 36 CFR §§800.3 through 800.6.

42.5(3) Responses to agency requests shall be made by the review and compliance staff within 30 days. Responses may indicate that no historic properties are located within the impact area, request the presentation of additional information and research, or that there is an effect. If an impact is indicated the review and compliance staff shall indicate the steps desired to mitigate the impact.

~~42.5(4) After initiating consultation, the state historic preservation officer or designee, the funding agency official, or the Advisory Council for Historic Preservation, at its discretion, may state that further consultation may not be productive and thereby terminate the consultation process. The agency official may then request the Council's comments in accordance with Section 800.6(b) of the National Historic Preservation Act of 1966 and notify all other consulting parties of the request.~~

ITEM 6. Adopt the following new rules 223—42.6(303) and 223—42.7(303):

223—42.6(303) Level of effort required to identify historic properties.

42.6(1) The level of effort required to meet the “reasonable and good faith” standard in Section 106 review is set forth in 36 CFR §800.4. The level of effort required shall be based on past planning, research and studies; the magnitude and nature of the undertaking and the degree of federal involvement; the nature and extent of potential effects on historic properties; and the likely nature and location of historic properties within the APE and may consist of any combination of background research, consultations, oral history interviews, sample field investigations and field surveys. In order to balance the mission and needs of a federal agency and its proposed project, the SHPO shall balance the level of effort and resources necessary to identify and preserve archaeological sites with the project benefits, costs, schedules and local issues that, in part, comprise the broader public interest.

42.6(2) In response to the agency's request for consultation, the SHPO shall base any recommendation for the identification of historic properties upon a review of the documentation provided by an agency pursuant to the reasonable and good-faith standard in conformance with the factors set forth in 36 CFR §800.4(b)(1).

42.6(3) It is the statutory obligation of the federal agency to fulfill the requirements of Section 106.

42.6(4) The level of effort required of rural electric cooperatives and municipal utilities shall be consistent with the requirements set forth in 2011 Iowa Code Supplement section 303.18.

223—42.7(303) Review and appeal of the recommendations and decisions of the state historic preservation officer.

42.7(1) In addition to any other review or appeal process afforded under federal or state law and regulations, the recommendations and decisions of the state historic preservation officer are subject to the review and approval of the director. This review may be initiated by the director for any reason or may be requested in the manner described in this rule.

42.7(2) A person, as defined in Iowa Code section 4.1(20), requesting the review of a recommendation or decision of the state historic preservation officer directly affecting that person shall provide the director with the following information, orally or in writing:

- a. Name and address of the requester.
- b. A description of the action of the SHPO requested to be reviewed.
- c. A short and plain statement of the reasons the review is requested.

42.7(3) Within 15 days following receipt of a request for review, the director shall notify the requester of the disposition of the request or of the need for additional information. Within 30 days following the receipt of the requested additional information, the director will notify the requester in writing of the disposition of the request for review.

42.7(4) A decision of the director is final. Judicial review of the actions of the director may be sought in accordance with the terms of the Iowa administrative procedure Act, Iowa Code chapter 17A.

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